



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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APR 12 2013

OFFICE OF
GENERAL COUNSEL

Re: Freedom of Information Act Appeal HQ-APP-2012-003426
(Appeal of Fees Charged for Processing Consolidated FOIA Request 08-FOI-00114-12)

Dear Ms. Temkin:

I am responding to your March 1, 2013 Freedom of Information Act ("FOIA") appeal. You appealed the January 31, 2013 fee assessment from James B. Martin, then Regional Administrator for EPA Region 8, charging fees assessed for EPA's processing of your FOIA request 08-FOI-00114-12 (the "Consolidated FOIA request"). The factual circumstances and background of this request and fee assessment are described in further detail below.

I have carefully considered your requests, the record of communications and correspondence related to your requests, EPA's fee decisions and responses, and your appeals. For the reasons set forth below, I have determined that your current appeal for a waiver or reduction of fees should be, and is, denied.

Factual Background

In December 2011,¹ your firm, on behalf of Encana Oil & Gas (USA) Inc. ("Encana"), sent related and overlapping FOIA requests to EPA Region 8, EPA Office of Research and Development (ORD), EPA Region 3, and EPA's Robert S. Kerr Environmental Research Center. As administratively consolidated by EPA, your FOIA request contained 20 sub-requests for distinct types of records, data, and other materials related to EPA's investigation of water quality conditions in the Pavillion Field area in Fremont County, including requests for "all records reflecting communications" regarding the Pavillion Field area within EPA Region 8, all records reflecting communications with personnel at Kerr and/or Shaw, all records reflecting communications with personnel at EPA Region 3 and EPA's Region 3 Laboratory, all records reflecting communications with EPA Headquarters, all records reflecting communications with ATSDR, and all records reflecting communications with outside parties. In your request, you defined "records" as used "in its broadest sense" to include (but not be limited to) the original, each draft, and any non-identical copies of any written, recorded, electronic, or graphic material of any kind within the Agency's possession or control. See FOIA Request Letter from Temkin Wielga & Hardt (December 12, 2011) at 1-3. You were categorized as a commercial use requester for FOIA fee purposes at that time. You did not request a complete waiver of fees at

¹ Most of the requests that were consolidated were sent on December 12, 2011. However, the request to EPA ORD appears to have been sent on December 23, 2011.

that time, nor did you appeal your fee category designation to EPA's National FOIA Office within 30 days, as EPA's regulations require. 40 C.F.R. §2.104(j).

Due to the size and complexity of your request, Michelle Marcu, Enforcement Attorney with the EPA Region 8 Legal Enforcement Program, contacted Linnea Brown in your Denver office to negotiate narrowing the scope of your request so that it could be processed with less cost and in a shorter period of time. Following telephone and electronic communications with EPA Region 8, on December 20, 2011, you sent a letter clarifying the scope of your request. In this letter, you agreed that your request did not seek documents concerning an Encana gas processing plant located to the east of the Pavillion Field area or NEPA documents from projects not addressing the Pavillion Field investigation. You declined to narrow the scope of your request to only non-exempt documents, but agreed that you would initially seek only a privilege log of exempt documents, and stated that you "will not initially seek redacted copies of those documents listed in the privilege log." Letter from Temkin Wielga & Hardt Re: Freedom of Information Act request for Pavillion Field Area at 1 (December 20, 2011). You stated that your requests 14-20 (for records reflecting "all communications") could be limited to records from January 1, 2005 to the present but did not otherwise narrow the scope of the "all communications" portions of the request or of any other portion of the request. *Id.* at 2.

On January 13, 2012, via electronic mail, EPA Region 8 exchanged communications with you over electronic mail regarding consolidating and further narrowing or clarifying your FOIA requests. This exchange included an Excel chart of the various requests, consolidated and assigned tracking number 08-FOI-00114-12. On January 18, 2012, EPA Region 8 sent you a letter confirming EPA's understanding of your narrowed FOIA request, which included the sentence "Encana agrees that it will initially seek only a privilege log of documents that EPA determines are FOIA-exempt but will not initially seek redacted copies of those documents listed on the privilege log." Letter from Michelle Marcu, Enforcement Attorney, EPA Region 8 at 2 (January 18, 2012). This letter also confirmed that Encana's definition of "all records" was to be construed to include *everything* potentially responsive to the request, incorporating the definition of records from the request and specifying additional types of records. *Id.* at 3. This January 18, 2012 letter further informed you that EPA had determined that the volume of potentially responsive records to your request and the fact that these records would be located in multiple EPA offices constituted "unusual circumstances" as defined by FOIA. 5 U.S.C. § 552(a)(6)(B)(iii). Therefore, your request was placed on the "complex" processing track as per EPA's regulations. 40 C.F.R. § 2.104(c). Finally, the January 18 letter informed you that the anticipated cost of responding to this request as clarified would substantially exceed \$250.00, and that EPA Region 8 would contact you as soon as practicable regarding a time frame for response, EPA's estimated cost of response, and the required prepayment. *Id.* at 4; *see also* 40 C.F.R. §§ 2.104(c), (d) and 2.107(j).

On February 16, 2012, EPA Region 8 sent you a letter estimating costs of \$114,360.00 to process your request, and an estimated time of six months from the date of prepayment to complete the response to your request. Letter from Matthew Cohn, U.S. EPA to Linnea Brown

(February 16, 2012) at 4. This estimate was based on 170 people with potentially responsive documents located in multiple EPA offices. *Id.* EPA Region 8 also informed you then that prepayment of estimated costs would be required to process your request. *Id.* EPA Region 8 further informed you that, if the costs to respond to your request exceeded the initial estimate, EPA would send a bill for the remainder of the charges. *Id.* Finally, EPA Region 8 informed you that the cost and time estimates provided were principally driven by your very broad requests for "all communications" and "all records," and that if you elected to narrow the scope of your request, it could decrease the length of time and cost of the response. *Id.*

On March 12, 2012 EPA Region 8 sent another letter to your Denver office, reiterating the \$114,360.00 cost estimate and estimated six months of processing time. Letter from Matthew Cohn to Linnea Brown (March 12, 2012) at 1-2. This letter additionally informed you that the estimated cost was a preliminary estimate, and that EPA might charge additional fees. *Id.* at 2. On March 27, 2012, EPA Region 8 sent you yet another letter stating that if Encana was unwilling to pay the estimated fee the FOIA request would be closed, and providing you the opportunity to refile your request. Letter from Matthew Cohn to Linnea Brown (March 27, 2012). You were provided further detail regarding your cost estimate in this letter, which stated that the estimate was based on 170 persons with responsive documents, 200 hours of search time, 3 minutes review time per document, and an average billable cost of \$30 / hour for search and review. *Id.* In this letter, you were also informed that there was a significant possibility that this estimate underestimated the actual cost of replying to your request, as additional individuals had been located with responsive records, and that you would receive a refund or a bill for additional charges as appropriate. *Id.* This estimate did not include costs incurred up to that point for collecting, reviewing, and posting online some technical documents that were responsive to parts of your request. As you were again informed, the cost estimate was for those costs incurred in responding to your "all communications" and "all records" requests. Following this letter, on March 27, 2012, you elected to pay the estimated cost of \$114,360.00. EPA Region 8 then informed you, via letter on March 29, 2012, that the estimated date of response would be September 27, 2012, and again offered you an opportunity to narrow the scope of the request. Letter from Matthew Cohn to Linnea Brown, March 29, 2012.

You then filed a request for a waiver of fees by letter dated April 30, 2012 to EPA Region 8. On May 2, 2012, Larry F. Gottesman, EPA's National FOIA Officer, sent you a letter denying your April 30, 2012 request for a fee waiver because your request for a fee waiver was not timely. On June 1, 2012 you appealed this decision to deny your request for a complete waiver of fees. On July 2, 2012, Kevin Miller with EPA's Office of General Counsel denied your appeal, as your fee waiver request was not timely filed under EPA's FOIA regulations, which require a request for a waiver or reduction of fees to be filed at the time of the request. 40 C.F.R. §2.107(l)(5).

On September 27, 2012, James B. Martin, Regional Administrator, EPA Region 8, provided you with an updated estimated completion date of early December 2012 to complete

processing your request. Letter from James B. Martin to Linnea Brown (September 27, 2012). This letter informed you that the EPA had identified over 200 people with potentially responsive documents, and that to provide a complete and thorough response EPA had used advanced electronic collection and review software. *Id.* This letter informed you that the response to your request required hundreds of staff hours from over 30 agency attorneys to complete the preliminary review, and that EPA had reviewed over 150,000 documents that were potentially responsive to your request. Notwithstanding the substantial amount of work performed by the Agency to respond to your request up to that point, EPA Region 8 again offered the opportunity to discuss narrowing your request, and again informed you that you would receive a bill or additional charge as appropriate. *Id.* at 2. On November 14, 2012, EPA Region 8 provided you with an interim release of 32,958 documents.

On December 3, 2012, EPA Region 8 provided the final response to your FOIA request. This response consisted of an external hard drive containing 52,573 documents responsive to your request in searchable .pdf format, 11 CDs (discs) containing data from Region 3, Region 8, and ORD and contract laboratories in native format, and indexes of the documents released and documents withheld, including the basis for withholding. EPA Region 8 informed you at that time that the response to your request entailed thousands of staff hours from more than 40 agency attorneys and technical professionals to collect and review over 250,000 documents.² Letter from James B. Martin to Linnea Brown (December 3, 2012) at 1. You were informed that EPA Region 8 was still calculating the final assessment of costs, and that you would be provided a refund or bill as appropriate.

On January 31, 2013 EPA Region 8 provided you with a bill for \$188,201.62, which exceeded the initial estimate of \$114,360.00 by \$73,841.62. Letter from James B. Martin to Elizabeth Temkin (January 31, 2013). The regional office informed you that the additional charge was due to the fact that over 200 people had documents responsive to the request, resulting in a higher than estimated cost for search and review. *Id.* This bill included charges of \$79,886.87 for search time, \$108,290.00 for review time, and \$24.75 for CDs. In this determination, I am responding to your March 1, 2013 appeal of this Region 8 final bill.

Your request for a complete waiver of all fees ("fee waiver")

In your appeal, you first claim that you qualify for a complete waiver of fees for processing the Consolidated request, HQ-FOI-00114-12. You initially requested a complete waiver of all fees associated with this request by letter dated April 30, 2012. As the EPA has informed you in previous communications, including EPA's May 2, 2012 letter denying your April 30, 2012 request for a fee waiver and in the EPA's July 2, 2012 letter denying your appeal

² These 250,000 documents were the documents that remained from over one million potentially responsive documents collected by EPA's software, following technical processing and de-duplication. Letter from James B. Martin to Linnea Brown (December 3, 2012) at 1.

of EPA's denial of your request for a fee waiver, your fee waiver request was not timely filed.

The EPA's regulations very clearly state that "requests for a waiver or reduction of fees must be submitted along with the request." 40 C.F.R. §2.107(l)(5). Furthermore, and as previously stated, the EPA's regulations on timeliness do not consider public interest in an issue in determining whether a request for a fee waiver was timely filed, nor is the time taken to clarify the scope of the request relevant to the determination as to whether a request for a fee waiver is timely. Therefore I am denying your request for a complete waiver of fees for the reasons explained in my July 2, 2012 letter denying your appeal HQ-APP-00125-12.

Your request for a change in fee category

In your March 1, 2013 fee appeal you next allege that the EPA cannot recover costs for review because your request for this information is not for a "commercial use." Therefore you state that you should not be charged review fees as a commercial use requester. The EPA categorized you as a commercial use requester when the EPA received your December 11, 2011 FOIA requests that were consolidated as HQ-FOI-00114-12.

You point to your April 30, 2012 fee waiver request letter (Exhibit 11 in your appeal) to demonstrate that you previously requested a modification of fee category. However, and as stated above, "requests for a waiver or reduction of fees *must be submitted along with the request.*" Therefore I find that your request for a change in fee category is not timely, and I am denying your appeal for a change in fee category and reduction of review costs on this basis.³

³ I note that the EPA's FOIA regulations define "commercial use request" at 40 C.F.R. § 2.107(b)(1). Under this definition, "commercial use request means a request from or on behalf of a person who seeks information for a use or purpose that furthers his/her commercial, trade, or profit interests, which can include furthering those interests through litigation." You admit in your June 1, 2012 appeal that you are a commercial entity involved in oil and gas production, including hydraulic fracturing, as part of your commercial, trade, or profit interests as those words are commonly understood. You further admit that you are the operator of the Pavillion Field, where the findings in EPA's Draft Report are located. You have a considerable commercial interest in the requested documents which relate to the EPA's investigation of potential oil and gas contamination of groundwater by oil and gas production activities at a production site that you operate. In addition, I find that as a publicly traded company you have a considerable commercial interest in activities by the EPA or other regulatory bodies that may impact the commercial, trade, or profit interests of Encana shareholders, including the Draft Report. Therefore, your appeal for a fee waiver and / or change in fee category, if timely, would likely be denied on this basis as well.

Your allegation that EPA's fee bill is excessive and unreasonable

Finally, you allege that the EPA's final fee of \$188,201.62 is excessive and unreasonable. Your appeal letter relies upon two related arguments—first, that EPA did not use the most efficient and least costly methods to comply with the request, and second that EPA's production was inadequate or unsatisfactory to you. Appeal letter at 12-14. To remedy these alleged deficiencies, you argue that EPA is obligated to refund you any charges associated with processing and reviewing documents that were withheld, that were duplicative, that were illegible in processing, or that were otherwise addressed in EPA's February 15, 2013 response to your January 2, 2013 appeal of EPA Region 8's response to your request.

I find these arguments unpersuasive. As an initial matter, under FOIA, "[n]either the Act or the Code of Federal Regulations conditions the payment of fees on the requesting party's satisfaction." *Stabasefski v. Dep't of Transportation*, 919 F. Supp. 1570, 1573 (M.D. Ga 1996). The EPA's Office of General Counsel has responded to your objections to EPA Region 8's response, and has directed EPA Region 8 to undertake certain actions, including re-review of some withheld documents and reprocessing of others, in order to address the substantive objections you again raise here. Appeal Determination Letter from Kevin Miller to Elizabeth Temkin (February 15, 2013). However, these objections are not relevant to your obligation, as a commercial requester, to pay reasonable standard charges for document search, duplication, and review. As detailed in the factual background above, EPA Region 8 provided you with multiple opportunities to narrow the scope of your broad requests for "all documents" and "all communications" in order to limit the charges incurred. You elected to maintain the scope of your response with full awareness of the nature of the estimated cost to process this request.

I further find that EPA Region 8's charges were not unreasonable given the size and scope of the request in this case. Your final bill included reasonable charges of \$79,886.87 for 2906.9 hours of search time by EPA program staff and IT professionals, \$108,290 for 3800.1 hours of attorney review time, and \$24.75 for 11 CDs (\$2.25 x 11 CDs). This is not unreasonable for a search that resulted in over 1 million documents, entailed the review of over 250,000 potentially responsive documents, and provided you with a final response of 52,573 documents (over 150,000 pages) responsive to your request in searchable .pdf format, 11 CDs (discs) containing data in native format, and over 83,000 documents withheld as exempt and privileged.

I find that you were charged these total fees properly as a commercial use requester under EPA's FOIA regulations, which include \$4.00 per quarter hour (\$12.00 / hour) for clerical personnel, \$7.00 per quarter hour (\$28.00 / hour) for professional personnel, and \$10.25 per quarter hour (\$41.00 / hour) for managerial personnel. 40 C.F.R. §2.107(i)(A)-(C). These regulatory rates also govern how much EPA can charge you for time spent by our contractors to process your request. Overall, your average costs for processing the broad "all documents" and "all communications" aspects of your FOIA request were approximately \$28.00 / hour in each category, an extremely reasonable hourly fee for the massive search, review, and production of

documents necessary to completely respond to the broad nature of your request.

Conclusion

This letter constitutes EPA's final determination on your appeal. In accordance with 5 U.S.C. § 552(a)(4)(B), you have the right to seek judicial review of this determination by instituting an action in the district court of the United States in the district in which you reside, or have your principal place of business, or in which the Agency records are situated, or in the District of Columbia.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Please call Jennifer Hammitt at (202) 564-5097 if you have further questions regarding this matter.

Sincerely,



Kevin M. Miller
Assistant General Counsel
General Law Office

cc: Larry F. Gottesman
National FOIA Officer

Matthew Cohn, Director, Legal Enforcement Program
EPA Region 8